No. _____

In The
Supreme Court of the United States
October Term, 1993

WALTER E. PILDITCH,

Petitioner,

v.

MARTY GOOL, ET AL.,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, according to the standard of evidentiary review established by this Court in *Anderson v. Bessemer City*, 470 U.S. 564 (1985), the court of appeals failed to follow that standard in reversing the trial court's findings and the jury's verdict determining that petitioner had been the victim of employment race discrimination.

2. Whether a plaintiff is required to present "hard evidence" beyond and separate from that circumstantial evidence presented in support of the *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), burden shifting framework, to carry his ultimate burden of proving intentional discrimination in a Title VII cause of action.

LIST OF PARTIES

WALTER E. PILDITCH,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF CHICAGO, A BODY CORPORATE AND POLITIC: FITZ BARCLAY, JR., MARTY GOOL, ESTHER MORGAN-WATTS, CALVIN L. PEARCE, AND WILLIA ROBINSON, AS MEMBERS OF THE MORGAN PARK HIGH SCHOOL LOCAL SCHOOL COUNSEL; GRADY C. JORDAN, AS DISTRICT SUPERINTENDENT, HIGH SCHOOL DISTRICT 11, CHICAGO BOARD OF EDUCATION,

Respondents.

The parties as listed above appear as in the caption used by the court of appeals in its opinion and include all of the original parties in the court of first instance. The actual parties in interest in this petition for a writ of certiorari are those against whom judgments in the trial court were entered and then reversed by the court of appeals, namely, MARTY GOOL, CALVIN L. PEARCE, AND WILLIA ROBINSON.

RULE 29.1 STATEMENT

Petitioner is an individual and not a corporation and thus has no parent or subsidiary companies.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Walter E. Pilditch respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App., *infra*, 1a-11a) is reported at 3 F.3d 1113.

JURISDICTION

The judgment of the court of appeals was entered on August 27, 1993. A petition for a rehearing thereof was timely filed on September 10, 1993. The petition for rehearing was denied by the court of appeals on September 21, 1993, and this petition is being filed within 90 days of that latter date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

This case is one of first impression under a statute designed to improve the face of Chicago's sagging public school system. The law (The Chicago School Reform Act, 105 ILCS 5/34, effective May 1, 1989) transferred a modicum of authority from the Chicago Board of Education to local school councils at each elementary and high school in the form of the right to choose principals for their schools. Each council was to consist of ten members, two community representatives (from the community compromising the school's attendance area), six parent members (each with a child at the school), and two teacher members (teachers at the school). Teacher members were to be elected by their peers. Parent and community representatives were elected (first election October, 1989) by parents voting only for six parent representatives and community residents without children at the school voting for only the two community resident positions. Terms were for two years. This portion of the law, as it related to the election of community and parent representatives, was held unconstitutional by the Illinois Supreme Court (*Fumarolo v. Chicago Board of Education*, 142 IL 2d 1283 (1990)) and The Reform Act ultimately revised to permit all parents and community residents to cast a maximum of five votes for the eight council positions (105 ILCS 5/34-2.1 (d)).

The Mayor of Chicago reappointed all unconstitutionally elected council members to complete the balance of their terms (to October 1991). The second election under The Reform Act (October, 1991) was held under the constitutionally corrected voting provisions.

Petitioner, Walter E. Pilditch, a Chicago public high school principal, was one of the first casualties of the new law. The Chicago School Reform Act abolished principal's tenure, constructively imposed four-year performance contracts upon principals (expiring either June 30, 1990, or June 30, 1991; by lot Pilditch's expired June 30, 1990), created mini school boards at each school (local school councils) and empowered them to select

principals. The first councils were elected citywide in October, 1989. On February 21, 1990, the council at Morgan Park High School, where petitioner had been principal since 1984, voted not to retain him as principal. To be retained for a four year term required the affirmative votes of six (of ten) council members. Pilditch received five affirmative votes for retention. Four voted not to retain him and one member abstained. These five members (four and one) are black, or in one instance black-hispanic; Pilditch is white.

Pilditch, believing he had been the victim of employment race discrimination, filed his complaint with the EEOC naming the Chicago Board of Education and the five council members who voted against him as respondents. A right to sue letter issued and Pilditch sued in Federal District Court (September, 1990), the Chicago Board of Education (his employer), a black district superintendent who did not select him from the list of three candidates (two black) presented to him by the council for selection of a principal when the council was unable to agree on a single candidate, and the five council members who had not voted to retain him as principal because of his race in violation of his rights under Title VII of the Civil Rights Act of 1964, (42 U.S.C. § 2000e-2(a)(1)) and 42 U.S.C. 1981 and 1983.

The basis for federal jurisdiction in the court of first instance was 28 U.S.C. § 1331 and 1343.

The case was tried over a three week period in April and May of 1992 before a racially mixed jury of ten men and women. Properly instructed, they returned verdicts on May 4, 1992, in favor of Pilditch and against three of the council members, Gool, Pearce and Robinson. Though the Civil Rights Act of 1991 had amended Title VII to provide for jury trials as a matter of right, when this case was tried, it was not clear whether or not the amendment would apply retroactively and thus with respect to the Title VII count, the jury's verdict was taken as advisory by the trial judge who entered his own findings of fact in general support of the jury's

conclusions. (App. 13 a) The case was properly tried to a jury on the 1981 and 1983 counts.

Both jury and trial judge found that Pilditch had established by a preponderance of the evidence that three of the defendants, Gool, Pearce and Robinson had not retained Pilditch as principal because of his race.

That finding has been reversed by the appeals court after a *de novo* review of the record.

REASONS FOR GRANTING THE PETITION

I.A.

The appeals court has not followed the "clearly erroneous" standard of review of *Anderson v. Bessemer City*, 470 U.S. 564 (1985) in that it has: substituted its judgment on the facts for that of the joint triers of fact below.

Anderson v. Bessemer City discourages the *de novo* review of factual issues that involve the weighing of evidence and the evaluation of the credibility of witnesses. Especially in cases of discrimination are those issues best left to the triers of fact, those who have looked witnesses squarely in the face and have heard testimony first hand.

Only in cases of the clearest error is the judgment of the trier of fact to be reversed.

As stated by Justice White in *Anderson v. Bessemer City,* at pg. 575, ". . . requiring (plaintiff) to persuade three more judges at the appellate level is requiring too much". It was just such persuasion that the court of appeals sought here during oral argument (opinion, App. 11a).

I.B.

The appeals court has not followed the "clearly erroneous" standard of review of *Anderson v. Bessemer City*, 470 U.S. 564 (1985) in that i has: drawn inferences from the evidence to support its own opinion rather than equally plausible inferences that would support the judgment of the initial triers of fact.

Where more than one inference may be drawn from evidence or testimony and the trier of fact draws a plausible inference therefrom, that inference or finding cannot be clearly erroneous simply because a court of appeals draws another inference therefrom. *Anderson v. Bessemer City*, 470 U.S. 574.

The court's opinion provides three examples of this contradictory inference drawing:

One is the reference to the broad smile of defendant Pearce at the time of his abstention in the February 21, 1990, vote on whether or not to retain Pilditch. The court of appeals saw it as a visible expression of a random thought unrelated to the voting process (" . . . Pearce might have been smiling because he just made plans for dinner at a fine restaurant", opinion, App, 9a). The jury and trial court might well have seen it as an expression of gratification at having participated in the firing of a white principal, as a tangible expression of reverse discrimination successfully executed.

A second piece of the evidence was defendant Pearce's "black male presence" conversation with another council member in the school's library. In that conversation (prior to the February 21, 1990 vote) Pearce referred to the need for a strong black male presence at the school. The court of appeals construed it as an isolated statement relating to teachers and not principals (neither were mentioned), not related to any specific action or decision by Pearce and one that expressed "a widely held view" (opinion, App. 10a). An equally

plausible interpretation of that conversation was that Pearce wanted a black principal for the school (at Pilditch's expense), that it was Pearce's view that the school's predominant black population (60%) entitled it to such, and in voting not to retain Pilditch (not voting affirmatively to do so), he fulfilled that expressed desire.

The third and only other piece of evidence from which the court draws its own contrary inference, is that of the victory yell or outburst of defendant Robinson as she entered the women's washroom following the February 21, 1990, vote. Her words were: "We did it girl!" The court of appeals infers (opinion, App. 10a) that such an outburst "suggests dislike of the principal (Pilditch) . . . but all dislike is not based on race." An equally plausible inference, as the trial court and jury were free to draw, is that Robinson's "whoop" was evidence of racial animus, particularly in view of other circumstantial evidence which the court of appeals failed to consider. Personal animosity may be racially motivated.

Based on these three pieces of evidence, from which the court draws its own inferences, those most favorable to defendants, the court of appeals concludes that based on the "paltry record" (opinion, App. 11a) the only way to conclude that Pilditch was discriminated against is to make the insupportable assumption that every time a black council member votes against a white principal the decision is motivated by race, and , that "hard evidence" (opinion, App. 11a) is required to prove that their action was inspired by improper motivations.

"Where there are two permissible views of the evidence, the fact finder's choice between them cannot be clearly erroneous" *Anderson v. Bessemer City,* 470 U.S. at pg. 574.

I.C.

The appeals court has not followed the "clearly erroneous" standard of review of *Anderson v. Bessemer City*, 470 U.S. 564 (1985) in that it has: ignored other substantial evidence in the record.

The "paltry" record includes other evidence which, when considered together, produces a mosaic that in turn forms a reasonably clear picture from which the triers of fact could have reasonably concluded that defendants' votes were motivated by race.

This evidence includes:

1. Defendants' refusal to give any reason for their vote not to retain Pilditch. The Chicago School Reform Act was amended after this verdict to require councils to give reasons for their decision (105 ILCS 5/34-2.3-1)

2. The high school's performance record during Pilditch's six (6) year tenure. Test scores and attendance consistently improved.

3. The almost unanimous support for Pilditch's retention by faculty and staff.

4. Racial polarization of the Council. The vote to retain Pilditch was along racial lines: five council members voted to retain (four white, one teacher, Helen Thomas, black); four voting not to retain (3 black, 1 black-Hispanic); one abstention, black.

5. After voting not to retain Pilditch, in the subsequent extended selection process, none of the three culpable defendants, Pearce, Gool or Robinson, ever voted for a white candidate.

6. Robinson and Pearce had never had a child at Morgan Park High School before transferring their children from parochial schools in September 1989 in order to be able to run for and serve on the local school council at Morgan Park.

7. Racial consciousness of Pearce, Robinson and Gool as expressed in conversations with other council members regarding display of African-American history materials in library, why percentage of black students hadn't increased during Pilditch's tenure, etc.

8. Pearce's smiling abstention as a transparent attempt to appear objective.

9. Pearce's (chairman) disdain for public participation or opposition and his stranglehold on the post Pilditch rejection selection process.

10. The brevity and perfunctory nature of the evaluation (of Pilditch) process as determined and conducted by the defendant council majority. Formal evaluation took place in a 45 minute executive session immediately preceding the vote of February 21, 1990 during which defendant council members voiced concern over a failure by Pilditch to significantly increase the black student population at the school. There was not even a pretence of objective evaluation. Black defendant council members expressed outrage at the request for a more extended evaluation process.

11. The patently transparent "at this time" argument advanced by defendants at trial, i.e. that they voted not to renew Pilditch's contract only to give themselves the opportunity to review other candidates and that their negative votes were not a rejection of Pilditch, and that they still considered him as a viable candidate. This was belied by the subsequent voting record of Gool, Pearce, and Robinson. They never cast any votes for Pilditch or for any white candidates.

12. The pretextual reasons offered by some defendants at trial to discredit Pilditch's performance: (a) supposedly hazardous conditions in science labs and (b) racial slur made by a white teacher. On both counts Pilditch introduced substantial evidence from which the trial court and jury might reasonably have concluded that the reasons were pretextual and a mere screen for racial discrimination.

An indication of the impact of the evidence presented by plaintiff and the credibility thereof could be seen in the jury's assessment of punitive damages against the liable defendants when they returned their verdict finding that defendants had intentionally discriminated against plaintiff because of his race.

What the court of appeals has done is to pick from the dry bones of the paper record, without an opportunity to judge the credibility of testimony, three pieces of circumstantial evidence capable of many interpretations and construe them in defendants' favor, ignore other pieces of plaintiff's evidentiary tapestry, and conclude, contrary to *Anderson v. Bessemer City,* that those three pieces of evidence, so construed, are insufficient to support both jury's verdict and court's finding in the absence of any additional "hard" evidence.

No one was in a better position to observe and sift the evidence than the jury and judge. They were in the best position to determine the sincerity and credibility of witnesses. It was for them to determine the meaning of Robinson's "war whoop" and absolute refusal to explain her vote. It was for them to see her evasive responses to direct questions.

> "Among the most difficult question faced by District Judges is the determination of 'discrimination'. It is a concept that while easy to define, may be exceptionally difficult to ascertain in a specific situation. It requires an examination into the mental processes of those who are deemed to have discriminated" *Gutzwiller v. Fenik*, 645 F.Supp. 363 (S.D.Ohio, 1986) at page 365.

Those who commit discrimination know it is wrong and do all they can to conceal it. The court of appeals, in its opinion, has unrealistically purified the defendants' mental processes. The jury and trial judge knew better.

The court of appeals calls for "hard" (opinion, App. 11a) evidence of discrimination in these cases and, then, as an example, (opinion, App. 10a), cites what defendant

chairman Pearce might have said to show evidence of a discriminatory intent. "If, for example, Pearce had made statements to the effect that he disliked or distrusted whites in general or could not judge them fairly" In other words, if Pearce had admitted a discriminatory intent then Pilditch might have proven his case. Such a position precludes a plaintiff from ever establishing a case of discrimination from circumstantial evidence and gives Local School Councils, under the guise of "school reform" the power to hire and fire principals without regard to the salutary provisions and protection of Title VII, § 1981 and 1983.

II.

The court of appeals has emasculated *McDonnell Douglas* and misinterpreted *Hicks* by holding that plaintiff must prove employment race discrimination by "hard" evidence rather than by a preponderance of circumstantial evidence.

This Court in its opinion in *St. Mary's Honor Center, et al. v. Hicks*, 113 S.Ct. 2742, dealt with the question of where the ultimate burden of proof lies in a cause of employment discrimination in relation to the burden shifting framework established by this Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, for proving discrimination by indirect evidence. In addition to discussing with whom the ultimate burden of proof lies, they also gave an indication of what type of evidence may be sufficient to carry that burden. We do not dispute the court of appeals' holding that the ultimate burden of proof lies with the plaintiff, but we do believe that they are in error in their extension of the *Hicks* opinion to require "hard evidence" to prove discrimination under Title VII. It is just such an extension that the dissent feared would be made, but was assured by the majority that it would not. See *Hicks* at 2761. This matter needs to be clarified by this Court as we believe the court of appeals to have made an unfortunate decision that contravenes the logic of this court in the *Hicks* and

McDonnell Douglas cases, as their holding essentially obviates the purpose of the *McDonnell Douglas* framework, which was certainly not the intention of this Court in *Hicks*, by redefining the type of proof sufficient to support plaintiff's ultimate burden.

The trial of the underlying cause of action in the district court properly utilized the *McDonnell Douglas* framework in the presentation of evidence. Plaintiff demonstrated his *prima facie* case, defendants offered legitimate nondiscriminatory reasons for his non-retention, and plaintiff offered voluminous evidence to demonstrate those reasons to be pretextual. It is at this point that the court of appeals' opinion conflicts with and/or misinterprets *Hicks* on two basic grounds.

The first point of conflict is in the court of appeals' requirement of "hard evidence" of discrimination, offering the following statement as the lone example of such evidence: "If, for example, Pearce had made statements to the effect that he disliked or distrusted whites in general and could not judge them fairly" (opinion, Appendix, pg. 10a). Such a statement, if made, would have obviated the need to make use of the *McDonnell Douglas* framework in this or any other case of employment discrimination. It would have been essentially direct evidence of discriminatory intent. It was clearly not the intention of this Court in *Hicks* to divest plaintiffs of the means of proving intentional discrimination through circumstantial evidence. As this Court stated, "the fact finder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination" *Hicks* at pg. 2749. However, the court of appeals takes this case from the original fact finders and imposes the additional requirement of "hard evidence". It is precisely the lack of such evidence which led to the development of the *McDonnell Douglas* framework, which allows an individual such as petitioner herein to present his cause to judge or jury based upon circumstantial evidence only, see *United States Postal*

Service Board of Governors v. Aikens, 460 U.S. 711, 716, which is predominately the only evidence available in employment discrimination actions. The court of appeals' search for "hard evidence" such as it has described would have a chilling effect on the decision of many similarly situated employees to pursue their cause of action under Title VII, and would certainly curtail the availability of Title VII protection to those who are discriminated against by those employers who in this age of awareness accomplish their task of invidious discrimination covertly.

The second and related misinterpretation is found in the court of appeals' failure to consider any of the evidence presented by plaintiff in support of the *McDonnell Douglas* framework in deciding whether plaintiff met his ultimate burden. It seems that the court of appeals, in its holding, based on *Hicks*, that the *McDonnell Douglas* framework drops out of the case following the plaintiff's presentation of evidence that the proffered reasons of defendants are actually a pretext for discrimination, not only dropped the framework but the evidence presented in support of that framework. That was certainly not this Court's intention in *Hicks*. The ultimate burden remains upon the plaintiff to prove intentional discrimination, yet the elements supporting the prima facie case, reasons offered by defendant in rebuttal, and most importantly evidence demonstrating that said reasons are pretextual, are all vital pieces of circumstantial evidence in support of the plaintiff's ultimate burden. As this Court stated in *Hicks*, "surely a more reasonable reading is that proving the employer's reason false becomes part of (and often considerably assists) the greater enterprise of proving that the real reason was intentional discrimination" *Hicks*, at 2752. The court of appeals has seemingly abandoned not only the framework of *McDonnell Douglas* but all of the evidence supporting it, requiring plaintiff to present his case from that point forward, stating "having offered these apparently legitimate reasons, the *McDonnell Douglas* formula disappears and the plaintiff is left to unmask, if he can, the reasons proffered by the employer

as false. Beyond this, he must also prove that the true reason for his firing was discriminatory." Opinion, Appendix, pg. 8a, citing *Hicks* at 2749. This is an inaccurate statement of this Court's position, as the trier of fact, at the point the framework drops out, is to proceed to determine the ultimate question, not seek additional proofs therefor. *Hicks* at 2749.

That the above errant reasoning must have been applied by the court of appeals is evidenced in their opinion, as they cite only three pieces of evidence, as the sum of plaintiff's case, which they believe in any way support plaintiff's ultimate burden. Opinion, Appendix, pgs. 8a-10a. This is so despite the fact that both a *prima facie* case had been demonstrated *and* plaintiff had presented ample evidence to demonstrate the falsity of the reasons presented by defendants in addition to the evidence mentioned by the court of appeals. The utter failure to address or consider this circumstantial evidence as part of their review demonstrates their misapplication of the basic holding in *Hicks* and *McDonnell Douglas* which is simply put, that the ultimate burden always rests with the plaintiff and that demonstration of defendant's reasons to be pretextual does not *compel* judgment for plaintiff. Somehow the court of appeals has taken this one step further, to mean that beyond the *McDonnell Douglas* framework plaintiff *must* present "hard evidence" of defendants' intent to discriminate in order to carry his burden, which holding would essentially bar all Title VII plaintiffs from success at trial, as such evidence simply seldom exists. This Court has established a framework which the court of appeals has significantly eroded with its opinion herein.

This case bears similarity to *Hicks* in that the court of appeals in both instances reversed the decision of the fact finder at the district court level. In *Hicks* the court of appeals reversed a judgment entered in the district court finding plaintiff not to have met his ultimate burden of proof, which reversal was based on a reading of *McDonnell Douglas* that judgment was compelled for plaintiff where the reasons of defendants

were demonstrated to be pretextual. Here the court of appeals has reversed the judgment of the fact finders that plaintiff had carried his ultimate burden of proof, which reversal is based upon the alteration of that burden to require what is essentially direct evidence. However, the level of plaintiff's ultimate burden lies somewhere in between, precisely where petitioner directed the court of appeals to look, " at the totality of the circumstances." (opinion, App., pg 11a) Judgment is neither compelled for plaintiff upon demonstration of pretext (*Hicks*) nor should it be compelled for defendants in the absence of direct evidence. Judgment must be based upon all of the evidence in the case including that which the court of appeals has brushed aside in its search for hard evidence or the proverbial smoking gun.

III.

This combined effect of the decision of the court of appeals will have a chilling effect on those suing under Title VII, 1981, or 1983, and is contrary to the congressional intent of those laws and to the decisions of this Court.

This Court in *Hicks* never went so far as to hold that direct evidence of discriminatory intent was required for the plaintiff to meet his ultimate burden. The court of appeals, however, has done so in this case. The criticism of the dissent in *Hicks* clearly applies to the opinion rendered in this case when it states: "The majority's scheme greatly disfavors Title VII plaintiffs without the good luck to have direct evidence of discriminatory intent." *Hicks* at 2761. The lack of direct evidence is what led to the development of the *McDonnell Douglas* framework to allow plaintiffs the opportunity to expose well crafted and disguised intentional discrimination.

The decision of the court of appeals will significantly narrow the road that leads to a successfully prosecuted case of employment discrimination and will do so at the expense of the decisions of this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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In the
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For the Seventh Circuit

Nos. 92-3932 and 92-4050

WALTER E. PILDITCH,

Plaintiff-Appellee,

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BOARD OF EDUCATION OF THE CITY OF CHICAGO, A BODY CORPORATE AND POLITIC; FITZ BARCLAY, JR., MARTY GOOL, ESTHER MORGAN-WATTS, CALVIN L. PEARCE, AND WILLIA ROBINSON, AS MEMBERS OF THE MORGAN PARK HIGH SCHOOL LOCAL SCHOOL COUNCIL; GRADY C. JORDAN, AS DISTRICT SUPERINTENDENT, HIGH SCHOOL DISTRICT 11, CHICAGO BOARD OF EDUCATION,

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 90 C 5526—**William T. Hart,** *Judge.*

ARGUED MAY 13, 1993—DECIDED AUGUST 27, 1993

Before CUMMINGS, POSNER and EASTERBROOK, *Circuit Judges.*

CUMMINGS, *Circuit Judge.* In an effort to give parents and local citizens more control over the public school system, the Illinois Legislature in 1989 passed an education

reform measure that created local councils in each school district and invested them with the power to hire and fire principals. 105 ILCS 5/34-2.2. Principals accustomed to job security were stripped of tenure and made to serve under four-year renewable contracts. One casualty of the new system, Walter E. Pilditch, brought this reverse discrimination suit claiming that the only reason he was fired from his position as principal of Morgan Park High School in Chicago was his race; Pilditch is white. He sued five of the ten elected members of the local school council, all minorities, who did not vote to renew his contract when it expired on June 30, 1990, along with the Chicago Board of Education and the district superintendent who chose Pilditch's replacement when the local council could not agree on a candidate.

Plaintiff requested damages based on lost wages and pension benefits under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1), and 42 U.S.C. §§ 1981 and 1983. Originally Pilditch also sought reinstatement at Morgan Park, but by the time the case was tried before an advisory jury, he had landed a position at another Chicago school; he is now principal at Curie High. The trial judge dismissed the Board of Education from the suit as a matter of law and the jury found that the plaintiff had failed to prove his case against the superintendent, Grady C. Jordan, and Esther Morgan-Watts, a local council member who had voted to oust him. But the jury rendered a verdict in Pilditch's favor on all counts against three council members—Marty Gool, Calvin L. Pearce and Willia Robinson—and he prevailed against a fourth council member, the Rev. Fitz Barclay, Jr., on the Title VII claim. The jury awarded Pilditch $62,085.03 in compensatory damages and levied punitive damages in various small amounts ($1,000 to $3,000) against the four defendants deemed to have violated the principal's civil rights. Judge Hart decided that the jury's verdict was merely advisory because the right to a jury trial in such cases hinges on the Civil Rights Act of 1991, which was passed by Congress after the local council voted to fire Pilditch but before his suit

came to trial. Based on our decisions in *Banas v. American Airlines*, 969 F.2d 477 (1992), and *Luddington v. Indiana Bell Tel. Co.*, 966 F.2d 225 (1992), he concluded that the Act did not apply retroactively—thus Pilditch was not entitled to a jury. Nevertheless, he adopted the jury's findings except that he negated the punitive awards and found that, in addition to the $62,085.03 in lost wages, Pilditch should receive another $92,465, the discounted present value of the pension benefits he forfeited under the council's decision. Although we recently agreed to consider whether the Civil Rights Act of 1991 is retroactive in these circumstances, *Mojica v. Gannett Co., Inc.*, 986 F.2d 1158 (1993) (granting a rehearing en banc), it makes no difference to our resolution of this case whether Pilditch was entitled to a jury or not because, no matter who the factfinder is, this Court is unable to locate in the record sufficient evidence to support the plaintiff's allegation that he was discriminated against because of his race.

We review the district court's findings of facts for clear error and its findings of law *de novo*. *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564. We give mixed findings of facts and law deferential review. *FDIC v. Bierman v. Stanley*, Nos. 91-2893 and 92-2941, 1993 U.S. App. Lexis 20459, at *21 (7th Cir. August 10, 1993). Pilditch, a thirty-seven-year veteran of the Board of Education and the principal at Morgan Park from March 1984 through June 1990, lost his job at a February 21, 1990 local council meeting when he could not muster a majority of votes to renew his performance contract for four more years starting that July. Under 105 ILCS 5/34-2.2(c), six of the ten elected members of the council have to vote affirmatively to renew a principal's contract. The council is made up of six parents, two teachers and two members of the community, along with a student who may not vote. At the February 21 meeting, defendants Barclay, Gool, Morgan-Watts and Robinson (all parent members) voted not to renew Pilditch's contract, and defendant Pearce abstained. Morgan-Watts, who was found innocent of the

allegations by judge and jury, is Hispanic; the other members who voted to fire Pilditch are black. After dismissing Pilditch, the local council solicited applicants for the vacant position. Roughly thirty-five people applied, including Pilditch, and thirteen were interviewed by most council members. Pilditch made that cut and one more—he was among the three finalists. The other two, Richard Kerr and Earl Bryant, are black. They have comparable experience to Pilditch, both have been principals for some years, and there is no suggestion that either was any less qualified than Pilditch to be principal of Morgan Park. In keeping with the provisions of the Illinois reform act, the local council voted on the three finalists but none of the candidates polled the seven votes required to select a new principal (as opposed to the six required to retain a principal). Thus the three names were submitted to the superintendent, defendant Grady C. Jordan, who gave the nod to Earl Bryant. Jordan is also black.

In the absence of direct evidence, a plaintiff in Title VII, § 1981 and § 1983 actions must abide by the complicated formula first set out in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-805, for proving discrimination by indirect evidence. *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121; *St. Mary's Honor Ctr. v. Hicks*, 113 S.Ct. 2742, 2746-2747 n.1. First the plaintiff must establish by a preponderance of the evidence a prima facie case of racial discrimination. Having done so, it is presumed that the employer has discriminated because of race unless he can articulate some other, legitimate reason for the rejection. If the trier of fact believes the evidence and the employer is silent in the face of the presumption, the court must enter judgment for the plaintiff because no issues of fact remain. *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 254. But if the employer does explain, the presumption shifts again—it is assumed that the employer did not discriminate—and the plaintiff must demonstrate that the employer's stated reason was pretextual (or phony, as we explained in *Visser v. Packer Eng'g Assoc., Inc.*, 924 F.2d 655, 657 (1991)), and ultimate-

ly that the employer's real reason for action was discriminatory. *Hicks*, 113 S.Ct. at 2749. The *McDonnell Douglas* framework "simply drops out of the picture" after the employer has offered a legitimate non-discriminatory reason for the firing, *Hicks*, 113 S.Ct. at 2749, and the plaintiff retains the ultimate burden of persuading the trier of fact that he was discriminated against because of some illegitimate concern, in this case race, *United States Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711, 716. Thus showing pretext alone is not sufficient for the plaintiff to carry the day, although it may support an inference that the real reason for the employer's action is discriminatory. *Hicks*, 113 S.Ct. at 2749.

We agree with the district court that Pilditch was able to establish a prima facie case of reverse discrimination. Under *McDonnell Douglas*, a prima facie case is made out by showing that the plaintiff is a member of a racial minority group, that he applied for and was qualified for a job for which the employer was seeking applicants, that he was rejected, and that afterward the position remained open to others with the complainant's qualifications. 411 U.S. at 802. Pilditch of course is not a member of a racial minority—this case involves alleged discrimination against a white by blacks. But the prima facie elements were never meant to be applied rigidly. *Id.* at 802 n.13. The most likely adaptation of the prima facie case to these unique circumstances, where Pilditch was both fired and then not hired for the vacant position he used to hold, would have him prove that he was meeting the employer's legitimate expectations, was adequately qualified for the job, was fired or not hired, and that the employer found a replacement of a different race. See *Hong v. Children's Memorial Hosp.*, 993 F.2d 1257, 1261 (7th Cir. 1993); *Weiss v. Coca-Cola Bottling Co. of Chicago*, 990 F.2d 333, 336 (7th Cir. 1993); *Fisher v. Transco Serv.-Milwaukee, Inc.*, 979 F.2d 1239, 1243 (7th Cir. 1992).[1]

[1] *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 279-280, makes clear that Title VII was intended to protect members of

(Footnote continued on following page)

Pilditch was fired and then not hired for his old position; he was certainly qualified for the job he held for six years—the state certified him, as well as his two main competitors, as such; and his replacement was black. The only tricky element is whether Pilditch was meeting his employer's legitimate expectations. Obviously he was not in the subjective sense since only half of the local council voted to renew his contract. But this alone cannot derail the plaintiff's case at this stage, because anytime an employer fired or demoted someone (as in every Title VII case of this kind), it would prove that the employee was not meeting expectations; the requirement, then, would be meaningless. The more relevant question is whether the employee is able to put on objective evidence that he is sufficiently competent to satisfy the legitimate expectations of an employer. In this case Pilditch was able to do so if only by showing that he had been hired as a principal at another school. Pilditch, then, was able to put forth a prima facie case of discrimination. After all, "the burden of establishing a prima face case of disparate

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[1] *continued*
the majority from race-based discrimination as well as members of minority groups. However, it remains an open question whether the *McDonnell Douglas* formula applies to reverse discrimination claims. See *Kirk v. Board of Educ. of Bremen Comm. High Sch. Dist. No. 228*, 811 F.2d 347, 354 n.10 (7th Cir. 1987); *Coates v. Johnson & Johnson*, 756 F.2d 524, 531 (7th Cir. 1985); but see *Ustrak v. Fairman*, 781 F.2d 573, 577 (7th Cir. 1986), certiorari denied, 479 U.S. 824 (*McDonnell Douglas* framework designed to protect women and minorities, not whites). The result in this case is the same either way because, as we will explain, the *McDonnell Douglas* framework drops out of the picture after the plaintiff has established a prima facie case of discrimination and the employer has put forth a non-discriminatory reason for his action (as was done here). At that point, after the *McDonnell Douglas* framework has served its purpose, the question is simply whether the plaintiff can prove that the employer acted because of an illegitimate motive. We have concluded for the reasons below that Pilditch cannot, and this result would be the same whether or not *McDonnell Douglas* applies to this reverse discrimination claim.

treatment is not onerous." *Burdine*, 450 U.S. at 253. As we recently reiterated, the initial elements of an indirect evidence prima facie case are relatively simple to prove, and are designed to see that the plaintiff can get beyond summary judgment even though direct evidence is absent. *Hong*, 993 F.2d at 1261-1262 (quoting *Randle v. LaSalle Telecommunications, Inc.*, 876 F.2d 563, 568 (7th Cir. 1989)); Paul J. Gudel, *Beyond Causation: The Interpretation of Action and the Mixed Motives Problem in Employment Discrimination Law*, 70 Tex. L. Rev. 17, 24 n.19 (1991).

The focus thus shifts to the defendants to offer a nondiscriminatory reason for their actions. *Burdine*, 450 U.S. at 259-260. But this burden is also quite light; the employer need not persuade the court that he was actually motivated by the reason he gives and the mere articulation of the reason rebuts the prima facie case and puts the onus back on the plaintiff to prove pretext. *Id.* at 254-256, 259-260. Here the defendants cited a number of reasons, any of which would have been sufficient to negate the prima facie showing. After the council voted not to retain Pilditch, there was a disturbance at Morgan Park and Pilditch closed the school even though he lacked the authority to do so. This incident obviously could not have colored the decision to terminate Pilditch's contract in the first instance, since it had not occurred yet, but it may have had some effect on Pilditch's later failure to regain his old job, and the superintendent testified that the school-closing incident was his reason for choosing another candidate. Defendants also testified that Pilditch had allowed unsafe conditions to prevail in a laboratory, that he responded inadequately when a white teacher made a racial slur, and that he did not work well with departments in the school. One defendant testified that after six years it was simply time for a change in leadership and that the system needed to be shaken up. Still another testified that the initial vote not to renew Pilditch's contract was preliminary in the sense that he could still be rehired, but by firing him the council seized an invaluable oppor-

tunity to give other candidates serious consideration as well.

Having offered these apparently legitimate reasons, the *McDonnell Douglas* formula disappears, *Hicks*, 113 S.Ct. at 2749, and the plaintiff is left to unmask, if he can, the reasons proffered by the employer as fake. Beyond this, he must also prove that the true reason for his firing was discriminatory. *Id.* This is where Pilditch fails; our review of the record suggests a singular lack of evidence to support the conclusion drawn by the judge and jury that Pilditch was fired and not rehired because he is white. As noted, the plaintiff always bears the ultimate burden of persuasion that he was the target of illegal discrimination. *Hicks*, 113 S.Ct. at 2747-2748.[2] In sum, here is the evidence that Pilditch put forth to prove the discriminatory intent of the local council members who voted against him: Calvin Pearce had a smile on his face when he abstained in the February 21, 1990 vote; Pearce, while touring the school's library, said that he felt the school needed a black male presence as part of a discussion about the paucity of African-American males in the teaching profession; and

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[2] Under *Price Waterhouse v. Hopkins*, 490 U.S. 228, 242, even if the employer does take race into account, the plaintiff will still not prevail if the employer can "prove that, even if it had not taken [an impermissible characteristic] into account, it would have come to the same decision regarding a particular person." This is the so-called mixed-motives case. If an employer has one acceptable motive and one unacceptable motive, and the acceptable motive is sufficient grounds for dismissal, the fired employee has no case. *Visser*, 924 F.2d at 658; see Candace S. Kovacic-Fleischer, "Proving Discrimination After *Price Waterhouse* and *Wards Cove*: Semantics as Substance, 39 Amer. U. L. Rev. 615 (1990). However, the Civil Rights Act of 1991 overrules *Price Waterhouse* on this point and makes an employment decision illegal if it was motivated at all by an illegitimate motive. 42 U.S.C. § 2000e-2(m). As noted, we have yet to decide whether the new Civil Rights Act would apply to this case. But because we find no evidence of illegal motive by the local council members, there is no need to dwell on the mixed-motives issue.

shortly after the vote to depose Pilditch, Willia Robinson let out what was described as a "whoop" and said, "We did it, girl." That's all. Of course we do not discount the possibility that gestures and shifty glances may reveal as much about a person's attitude as his verbal statements, but attributing discrimination to a council member merely because he may have been smiling while voting (to abstain, no less) is unwarranted. Council member Pearce might have been smiling because he saw someone he knew in the crowd, or received a humorous note, or just made plans for dinner at a fine restaurant. Even if the smile were in fact the result of the vote to remove Pilditch, Pearce might have been glad only because he thought a better principal, not a black principal, would be Pilditch's replacement. In short, the smile might indicate something about how Pearce was feeling about the Pilditch vote, but not why he was feeling it.

Pearce did say that the school should have a stronger black male presence. The testimony on this point was as follows:

> Q: And did he, during the course of his conversation with you, make any mention of race?
>
> A: Yes.
>
> Q: What particularly did he say and where was he when he said it?
>
> A: Yes. He, in the library he wanted to know where the collections were on African-American studies and why weren't they prominently displayed in the front. And I showed then the collections and the library order and then the other displays. There were advertisements at the time from the black college fair. And then, in the hallway, he was looking around, and he said that he felt that the school needed a black male presence.
>
> Q: Were those his words?
>
> A: Yes.
>
> Q: Did he enlarge upon that statement?

> A: No. We got into a discussion on the problems in attracting African-American males into the teaching profession.

(Plaintiff's app. at 34.) By its own terms, Pearce's statement about the necessity of a stronger black male presence led to a discussion about the lack of black teachers, not black principals. In any event, there is no suggestion in the record that Pearce translated this general concern about black role models into a specific decision to oppose Pilditch because of his race. One could imagine other isolated statements that, coupled with action, might give rise to an inference of discrimination. If, for example, Pearce had made statements to the effect that he disliked or distrusted whites in general and could not judge them fairly, it might be possible to assume that his decision about Pilditch was spurred by racial concerns. But merely lamenting the absence of black male teachers as role models in schools with large black populations—a widely held view, by the way—in a discussion that did not involve Pilditch at all cannot be taken as proof of discriminatory intent without some other supporting evidence.

Finally, Willia Robinson let out a "whoop" and said "We did it, girl" as she entered the women's bathroom five to ten minutes after the vote. One witness testified that "as the door closed, there was all kinds of ruckus, laughter, and silliness" (plaintiff's app. at 39). Like Calvin Pearce's smile during the voting, Robinson's statement may suggest that she was elated by the fact of Pilditch's ouster, but it does not convey any reliable information about why she voted the way she did. A joyful whoop at the firing of a principal suggests dislike of the principal, it is true, but all dislike is not based on race.

Recall that the local council system was part of an educational reform package designed to give parents and community members more control over the schools. By putting the power to hire and fire principals in the hands of non-professionals, the Legislature must have realized that local councils would make changes for changes' sake

as a way of exerting their newfound authority, even if there were not glaring deficiencies in a principal's leadership. The only way to conclude based on this paltry record that the plaintiff was discriminated against because he was white is to make the illogical and insupportable assumption that every time a black council member votes against a white candidate, the decision is motivated by race. This is impermissible. *Ustrak*, 781 F.2d at 576-577. "Racial discrimination against whites is forbidden, it is true, but no presumption of discrimination can be based on the mere fact that a white is passed over in favor of a black." *Id.* at 577. The notion that all black decision-makers are driven by this single issue rests on just the type of stereotype the civil rights laws were designed to prevent from infecting personnel decisions; it would be painfully ironic if those same laws were here used to perpetuate such stereotypes. Mere subjective beliefs by the plaintiff—without the backing of hard evidence—cannot prove that an action was inspired by improper motivations. *McMillian v. Svetanoff*, 878 F.2d 186, 190 (7th Cir. 1989).

At oral argument we pressed counsel for Pilditch to spell out what specific evidence in the record showed that the defendants intentionally discriminated against his client. To our repeated entreaties, he could only respond that we must look at the totality of the circumstances. We have. Because there is no proof of discrimination, the district court's judgments against the four defendants are reversed.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

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United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

September 21, 1993

Hon. WALTER J. CUMMINGS, Circuit Judge

Hon. RICHARD A. POSNER, Circuit Judge

Hon. FRANK E. EASTERBROOK, Circuit Judge

WALTER E. PILDITCH,
Plaintiff-Appellee,

No. 92-3932
92-4050 vs.

BOARD OF EDUCATION OF THE CITY OF CHICAGO, et al.,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

No. 90 C 5526

William T. Hart,
Judge

ORDER

On consideration of the petition for rehearing with suggestion for rehearing in banc filed by plaintiff-appellee on September 10, 1993 no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

WALTER E. PILDITCH,
Plaintiff,

No. 90 C 5526

v.

BOARD OF EDUCATION OF THE CITY CHICAGO, a body politic and corporate, et al.,
Defendants.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

I. INTRODUCTION

In this action a white school principal claims reverse race discrimination on the part of black and Hispanic school council members and a black district superintendent of schools. The plaintiff also attributes this conduct to defendant Board of Education of the City of Chicago ("Board of Education"). Plaintiff Walter E. Pilditch was employed by defendant Board of Education as tenured principal of Morgan Park high School ("Morgan Park") from March, 1984 to June 30, 1990. The Chicago Educational Reform Act (the "Reform Act"), Ill. Rev. Stat. ch. 122 ¶ 34-1.01 *et seq.* (1991), replaced tenure for principals with four-year renewable employment contracts. The Reform Act also created local school councils and empowered them to elect, retain and renew the contracts of school principals. Defendants Rev. Fitz Barclay, Jr., Rev. Marty Gool, Esther Morgan-Watts, Calvin L. Pearce and Willia G. Robinson (the "School Council defendants") are five of the ten elected members of the Morgan Park Local School Council (the "Council").

Under the Reform Act, six affirmative votes were required to renew Pilditch's employment contract. Pilditch received five affirmative votes and, thus, his principalship was terminated. Four of the five School Council defendants voted against Pilditch and the fifth, Calvin L. Pearce, abstained. Seven votes did not exist for the appointment of a replacement. Accordingly, as required by the Reform Act, the Council submitted a list of three candidates for principal to defendant Grady C. Jordan, who as District Superintendent of High School District 11 made the final selection. Pilditch was third on the list. Jordan choose the second candidate, Earl Bryant. The other two candidates were Richard Kerr and Earl Bryant.

Plaintiff alleged that the individual defendants failed to choose him on the basis of his race. Plaintiff claims that defendants Rev. Fitz Barclay, Jr., Rev. Marty Gool, Esther Morgan-Watts, and Willia G. Robinson voted not to retain plaintiff on the basis of his race on February 21, 1990; that defendant Calvin L. Pearce abstained from voting to retain plaintiff on the basis of his race knowing that his abstention would cause plaintiff not to be retained on February 21, 1990; and that defendant Grady C. Jordan did not choose plaintiff on the basis of plaintiff's race in early May, 1990. Plaintiff brought suit under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1), and 42 U.S.C. §§ 1981, 1983 complaining that defendants, including the Board of Education violated his rights under Title VII and the Equal Protection Clause of the Fourteenth Amendment.

A jury heard both the Title VII clam and the § 1983 and § 1981 claims. At the close of plaintiff's case, judgment as a matter of law was entered in favor of the Board of Education, there being no evidence of any employment action with respect to plaintiff by the Board of Education or that the conduct of other defendants was attributable to the Board of Education. On May 4, 1992,

the jury returned a verdict in favor of defendants Esther Morgan-Watts and Grady C. Jordan on all counts. The jury found in favor of plaintiff and against defendants Rev. Fitz Barclay, Jr., Rev. Marty Gool, Calvin L. Pearce and Willia G. Robinson on the Title VII claim. The jury found against plaintiff and in favor of defendant Rev. Fitz Barclay, Jr. on the counts other than Title VII. On the §§ 1981 and 1983 claims, the jury found in favor of plaintiff and against defendants Rev. Marty Gool, Calvin L. Pearce and Willia G. Robinson. The jury awarded plaintiff $62,085.03 in compensatory damages. Additionally, the jury awarded plaintiff the following punitive damages: (1) $1,000 against Rev. Fitz Barclay, Jr.,; (2) $1,500 against Rev. Marty Gool; (3) $3,000 against Calvin L. Pearce; and (4) $1,500 against Willia G. Robinson. Defendants Barclay, Gool, Pearce and Robinson moved for judgment as a matter of law or, in the alternative, for a new trial and vacation of the jury's punitive damage verdict. Plaintiff moved for reinstatement, allowance of lost pension benefits and attorney fees.

II. THE CIVIL RIGHTS ACT OF 1991

Defendants first argue that the Title VII claim was improperly heard by the jury. This court had previously held that the Civil Rights Act of 1991 was retroactive. *See Mojica v. Gannett Co.*, 779 F. Supp. 94 (N.D. Ill. 1991). Consistent with that decision and upon plaintiff's request, the Title VII claims were tried to a jury. However, this court stated that if the Seventh Circuit ruled that the Act was not retroactive, then it would consider the jury's verdict on the Title VII claim to be only advisory. After the trial, the Seventh Circuit held that the Civil Rights Act of 1991 was not retroactive. *See Banas v. American Airlines*, __F.2d___, 1992 WESTLAW 177383 (7th Cir. July 29,1992); *Luddington v. Indiana Bell Telephone Co.*, 966 F.2d 225 (7th Cir. 1992). Based upon these authorities, the jury's verdict concerning

plaintiff's Title VII claim will be considered only advisory. See Fed. R. Civ. P. 39(c) (1991) (in all actions not triable of right by a jury the court upon motion or of its own initiative may try any issue with an advisory jury); 9 WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE § 2335 (1971); *see also Yatvin v. Madison Metropolitan School Dist.*, 840 F.2d 412 (7th Cir. 1988) (it makes no difference that the same jury was an advisory jury on some issues and the trier of fact on others).

The responsibility of decision on plaintiff's Title VII claim remains with this court when an advisory jury is used. *Yatvin*, 840 F.2d at 418; *see also Wilson v. Prasse*, 463 F.2d 109 (3d Cir. 1972). It is within a court's discretion to accept or reject the advisory jury's verdict. 9 WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE § 2335 (1971); *see also Yatvin*, 840 F.2d at 418. However, when the jury's verdict is advisory the court must also enter findings as required by Federal Rule of Civil Procedure 52(a). Based upon the following findings of fact and conclusions of law, the advisory jury's verdict concerning plaintiff's Title VII claim is supported and accepted. The following constitutes the court's findings of fact and conclusions of law.

III. FINDINGS OF FACT

A. Uncontested Facts

The court adopts as findings of fact the following uncontested facts made a part of the Final Pretrial Order.

1. Plaintiff Pilditch has been employed by defendant Board of Education for 37 years.

2. Pilditch was principal of Morgan Park from March 1984 to June 30, 1990.

3. Defendant Board of Education is a body corporate and politic, organized pursuant to the applicable provisions of the Illinois School Code, Ill. Rev.

Stat., ch. 122, sec. 34-2, charged with maintaining a system of free schools in the City of Chicago.

4. The School Council defendants Barclay, Gool, Morgan-Watts, Pearce and Robinson, were elected to membership on the Council in October, 1989, and served terms thereon through and including September, 1991.

5. Defendant Jordan is employed by the Board of Education as the District Superintendent of High School District 11.

6. Jordan has been District Superintendent of High School District 11 from September, 1989, to the date hereof, and has been employed by the Board of Education for 26 years.

7. The Reform Act was enacted to become effective May 1, 1989.

8. Prior to May 1, 1989, Pilditch was the tenured principal at Morgan Park.

9. The Reform Act constructively imposed performance contracts upon existing principals expiring June 30, 1990, and June 30, 1991.

10. Pilditch's performance contract expired June 30, 1990.

11. The Reform Act required the Council to decide whether to renew or not to renew Pilditch's performance contract.

12. Six affirmative votes were required to renew Pilditch's contract.

13. If the Council did not renew Pilditch's contract, it was to select a new principal.

14. Seven affirmative votes were required for the selection of a new principal.

15. If no one candidate received seven affirmative votes, a list of three candidates, in order of the

Council's preference, was to be submitted to Jordan from which list Jordan was to select the principal for Morgan Park.

16. The Council, for principal retention and selections purposes, had ten voting members.

17. At the Council's meeting of February 21, 1990, all ten voting Council members were present. The student member and Pilditch were also present.

18. At the Council's meeting of February 21, 1990, the Council voted on the question of whether or not to retain Pilditch as principal, that is, whether or not to offer him a four year performance contract commencing July 1, 1990, and expiring June 30, 1994.

19. At its meeting of February 21, 1990, the Council voted not to retain Pilditch.

20. Five Council members voted to retain Pilditch.

21. Four Council members, School Council defendants Barclay, Gool, Morgan-Watts and Robinson voted not to retain Pilditch.

22. School Council defendant Pearce abstained.

23. Barclay, Gool, Robinson and Pearce are black. Pilditch is white. Defendant Esther Morgan-Watts is Hispanic.

24. On or about March 14, 1990, the Council "advertised" for the vacant principalship at Morgan Park, that is, the Council solicited applicants for the vacancy.

25. There were approximately 35 applicants for the vacancy.

26. Pilditch was one of the applicants.

27. Approximately 13 of those candidates were interviewed by most members of the Council.

28. Pilditch was one of those interviewed.

29. Pilditch's credentials include a State of Illinois Type 75 General Administrative Endorsement (#1294628).

30. Richard Kerr has been the principal of Nash Elementary School since 1984.

31. Richard Kerr's credentials include a State of Illinois Type 75 Superintendent Endorsement (#1233297), State of Illinois Type 75 Administrative Endorsement (#850239) and a Chicago Public School's Principal's Certificate.

32. Earl Bryant was the principal of John F. Kennedy High School From 1984 until he began serving under a new performance contract at Morgan Park in July, 1990. He has been principal at Morgan Park since July 1, 1990.

33. Earl Bryant's credentials include a State of Illinois Type 75 Administrative Endorsement.

34. Richard Kerr was one of the applicants who responded to the advertisement for the vacant principalship at Morgan Park.

35. Richard Kerr was interviewed by most of the the Council members.

36. Earl Bryant was one of the applicants who responded to the advertisement for the vacant principalship at Morgan Park.

37. Earl Bryant was interviewed by most of the Council members.

38. No one applicant received the seven affirmative votes required by the Reform Act for selection of a new principal.

B. Trial Evidence

Based on the evidence presented at trial, the court

further finds as follows:

39. The Council submitted, on or about April 11, 1990, the following list of candidates to Jordan in the following order of preference: Richard Kerr, Earl Bryant and Pilditch. Kerr and Bryant are black, Pilditch is white. Jordan is black. Jordan chose Bryant.

40. Pilditch is currently employed by the Board of Education and serves as Director of Performing Arts at Curie High School in Chicago. He has recently accepted a contract as principal of Curie High School.

41. Morgan Park is racially integrated; the student body is comprised ad follows: 60% black; 20% Hispanic; and 20% white. Blacks are in the majority at the school. The faculty is racially mixed.

42. Morgan Park's reputation was one of excellence in the City of Chicago. The school's rating improved while Pilditch was principal.

43. Council Members Willis T. Cowing, a teacher at Morgan Park for 20 years, testified that plaintiff was "one of the best principals we ever had". He testified that teacher and student support of plaintiff was very high.

44. The Council is composed of ten elected members: six parents; two teachers; and two community residents. The teacher and community members supported the retention of Pilditch. In October of 1989, the Council held its first meeting during which Calvin Pearce was elected Chairman, and Rev. Marty Gool was elected Vice-Chairman. Calvin Pearce had a daughter at the school and was a parent representative on the Council. Rev. Marty Gool had four children enrolled at the school and was also a parent representative.

45. On February 21, 1990, the Council voted on whether to retain plaintiff as principal of the school. Six

affirmative votes (out of ten available votes) were required to renew plaintiff's employment contract. Pilditch received five affirmative votes, and his contract was terminated. Defendants Rev. Fitz Barclay, Jr., Rev. Marty Gool, Willia G. Robinson and Esther Morgan-Watts voted not to renew Pilditch's contract. Defendant Calvin Pearce abstained.

46. The day following the Council vote not to retain plaintiff, some students left classrooms and there was a disturbance at the school related to the Council's action. Plaintiff reported the disturbance to Jordan's assistant. Police who were called recommended to Pilditch that he close the school. According to Board procedure, a principal does not have authority to close a school. Only the Assistant Superintendent of Schools has authority to authorize a school closing. Pilditch closed the school without obtaining such authority. Jordan testified that he did not choose Pilditch, in part, because of his handling of the school closing incident. The jury did not find Jordan liable. His explanation is supported by credible evidence.

47. Defendant Calvin Pearce testified that he did not vote for Pilditch because he failed to deal with a dangerous situation that existed in the science lab at the school. The North Central Schools Association report reviewing the school stated that certain laboratory chemicals were not properly secured and that certain laboratory electrical wires were not properly insulated. Other evidence indicated that the situation was not serious. A dispute in the evidence on this point could have been resolved by the jury by concluding that the criticism was not well founded and pretextual.

Pearce also testified that he was concerned because Pilditch did not work together with the departments the school. However, the other evidence supports the fact that the teachers in the school worked well with Pilditch and wanted him to remain principal.

48. Pearce testified that Pilditch did not act promptly enough when a white teacher made a racial slur. Jordan's testimony supported Pilditch's procedure in handling this incident. This dispute in the evidence could also have been resolved in favor of Pilditch.

Pearce did not recall whether he voted for plaintiff or not in the final vote for principal.

During a tour of the school Pearce stated to Council member Swanson, in a discussion relating to attracting African-American males in the teaching profession, that the school needed a black male presence.

There is credible evidence to support the jury's verdict on liability.

49. Defendant Willia Robinson did not provide any reason for her vote not to retain Pilditch. A witness testified that Robinson said -- in an exulting manner -- "We did it" after the vote to retain plaintiff was against him. There is credible evidence to support the jury's verdict on liability.

50. Defendant Rev. Marty Gool testified that Pilditch failed to handle properly the school disturbance after the vote. However, the disturbance occurred after the Rev. Gool voted not to retain Pilditch. Gool states that at the public session of the February 21st meeting, more people spoke in favor of Pilditch than against Pilditch. Gool voted against Pilditch directly after the public participation section ended. Gool stated that the other applicants had "certain characteristics" that Pilditch did not; but he did not identify those characteristics or otherwise explain his votes. There is credible evidence to support the jury's verdict on liability.

51. Defendant Esther Morgan-Watts testified that she had problems with the system. She voted not to retain Pilditch because she wanted a change. She

testified that she did no vote against Pilditch, but against the system. At the February 28th executive session meeting, Morgan-Watts was willing, as a member of the prevailing side, to put forth a motion to reconsider the February 21st vote. Her explanation is supported by credible evidence.

52. Although defendant Rev. Fitz Barclay, Jr., voted not to retain Pilditch at the February 21, 1990 meeting, he stated that the vote was not final. He considered his vote at the February 21st meeting temporary. He did not otherwise explain his votes. The jury found him liable under Title VII but not liable on the remaining counts. There is credible evidence to support the jury's verdict on liability.

53. After the trial, Pilditch informed the court that he has taken a position as principal of another Chicago high school and that he no longer seeks reinstatement.

54. Subsequent to the trial,[1] plaintiff was allowed to present proof of the effect on his pension from the years 1992 to 2009 (based on his life expectancy form his intended retirement date) as a result of the loss of his position as principal for the period from July 1990 to the date of the trial.[2] The pension differential (because of a lower salary after 1990) was shown to be $170,376. By

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[1]This aspect of the claim for relief was open to subsequent consideration by the court alone because a diminished lost future pension is a form of equitable relief for determination by the court.

[2]Plaintiff was not permitted to offer such proof at the trial because the amount claimed was not reduced to present value by the application of an appropriate discount factor as required by applicable circuit precedents. *O'Shea v. Riverway Towing Co.*, 677 F.2d 1194, 1199-1201 (7th Cir. 1982); *Abernathy v. Superior Hardwoods, Inc.*, 704 F.2d 963, 974 (7th Cir. 1983).

application of an appropriate 6.5% discount factor, the present worth was shown to be $92,465 and will be awarded to put plaintiff in a make-whole financial position.

IV. CONCLUSIONS OF LAW

1. The jurisdiction of this court is invoked pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*, to redress plaintiff's claims that he was discriminated against because of his race.

2. In a disparate treatment case under Title VII, plaintiff has the burden of proving by a preponderance of the evidence that he was discriminated against on the basis of race by defendants' failure to retain him as principal of Morgan Park. *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *Albermarle Paper Co. v. Moody*, 422 U.S. 405 (1975); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

3. To establish discrimination plaintiff must first make out a prima facie case by proving actions taken by the defendants from which one can infer, if such actions remain unexplained, that it is more likely than not that such actions were "based on a discriminatory criterion illegal under the Act." *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 576 (1978); *see also Texas Department of Community Affairs v. Burdine, supra*.

4. Plaintiff may discharge this burden either by producing direct evidence of discrimination, or by utilizing the indirect burden-shifting method of proof set forth in *McDonnell Douglas Corp. v. Green*.

5. Plaintiff can establish a prima facie case of employment discrimination by showing either (1) evidence of race discrimination or (2) that the defendants' proffered reason for their conduct was a pretext for race

discrimination.

6. Defendants have the burden to articulate some legitimate non-discriminatory reasons for their actions. If defendants articulate a non-discriminatory reason the burden shifts back to plaintiff to prove by a preponderance of the evidence that he proffered reason was really a pretext for discrimination.

7. Pretext may be demonstrated in one of two was: (1) directly by persuading the trier of fact that a discriminatory reason more likely motivated a defendant; or (2) indirectly by showing that a defendant's proffered reason is unworthy of credence. *McDonnell Douglas corp. V. Green, supra; Texas Department of Community Affairs v. Burdine, supra;*

8. Defendants do not have the burden of proving that their actions were not based upon plaintiff's race. The burden of proof of discrimination remains upon the plaintiff throughout the case. In addition, where any defendant offers evidence to show that defendant's decision was based on reasonable, nondiscriminatory factors, such as plaintiff's qualifications or past performance. plaintiff has the burden of negating such evidence by proving that such factors were a mere pretext for discrimination. *Texas Department of Community Affairs v. Burdine, supra.*

9. A defendant in a case such as this is not required to prove that it made the best possible decision or even that the decision in issue was wise or correct. It is not the function of the court to second guess the defendants' rational judgments, if it finds the defendants gave a legitimate reason for the decision not to retain plaintiff. *Texas Department of Community Affairs v. Burdine, supra.*

10. If a defendant explains a legitimate reason for the non-retention decision, then plaintiff is not entitled to prevail unless he proves that that defendant's

explanation was a pretext, that is, merely an excuse for discriminating against plaintiff on the basis of his race. It was ruled that plaintiff presented a prima facie case. Accordingly, the jury was instructed as follows:

> To prevail on his [Title VII] claim against any defendant, plaintiff must prove that the defendant intentionally discriminated against him on the basis of his race. Plaintiff must prove that race was a motivating factor, even though other factors also motivated a defendant's conduct. Plaintiff may prove this by establishing either:
>
> (1) evidence of race discrimination; OR
>
> (2) that the defendant's proffered reason for his or her conduct is a pretext for race discrimination
>
> * * * * * *
>
> In deciding whether a reason offered for an employment decision is a pretext for racial discrimination you must decide whether the reason offered is or is not worthy of belief. If the reason offered is unworthy of belief, or if no reason is advanced, the inference that race discrimination was the real reason may be drawn, but the inference is not compelled. However, a defendant may make an employment decision on any basis that the defendant wishes, whether wise or unwise, so long as it is not a discriminatory reason.
>
> * * * * * *
>
> To prevail on his Section 1983 equal protection claim against any defendant, plaintiff must prove that the defendant intentionally and purposefully discriminated against him based upon his race by proving each of the following elements:
>
> (1) That the action of the defendant was under color of state law; and

(2) That the plaintiff's membership in the white race was a motivating factor in the defendant's decision on not to retain plaintiff, or to abstain from voting or, in the case of defendant Grady C. Jordan, not to select plaintiff as principal of Morgan Park High School; and

(3) That the defendant's acts were the proximate or legal cause of damages sustained by the plaintiff.

* * * * * *

To prevail on his [§ 1981] claim against a defendant, plaintiff must prove that the defendant intentionally discriminated against him because of his race by proving the following elements:

(1) That plaintiff's race was a motivating factor in that defendant's decision not to vote to retain plaintiff or to abstain from voting to retain plaintiff or, in the case of defendant Grady C. Jordan, the decision or not to choose plaintiff as principal of Morgan Park High School; and

(2) That as a direct result of such discrimination, plaintiff sustained damages.

* * * * * *

In showing that plaintiff's race was a motivating factor as to the conduct of any defendant, plaintiff is not required to prove that his race was the sole motivation. The plaintiff need only prove that his race played a part in the decision.

On the other hand, your verdict will be for the defendant if you find that plaintiff's race was not a motivating factor in the defendant's decision.

11. This is a reverse discrimination case. A member of the majority is claiming discrimination by

members of a minority group. Courts have stated that this type of claim requires a showing that a member of a minority is discriminating against the member of the majority in connection with the presentation of a prima facie case. *Kirk v. Bremem Comm. High Sch. Dist. Bd. of Educ.*, 811 F.2d 347, 354 n.10 (7th Cir. 1987); *Ustrak v. Fairman*, 781 F.2d 573 (1986); *Murray v. Thistledown Racing Club, Inc.*, 770 F.2d 63 (6th Cir. 1985); *Lanphear Slater Steels Corp.*, 660 F. Supp. 1570, 1575-76 and n.8 (N.D. Ind. 1987). Plaintiff offered background facts form which the jury could have found that defendants had a preference for a black male role model[3] in school *v. Prokop*, 703 F.2d 1311 (D.C. Cir. 1983); *Jones v.*where the majority of students are also black. Defendant Pearce, the Council chair, is reported to have stated his desire for black male presence in the school. The difficulty (and the consequences) posed by the defendants' desire for a black role model and their obligation not to discriminate against plaintiff because of his white race was properly a matter for jury consideration.

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[3]The Supreme Court has rejected role model justification, at least as a justification for having black teachers in the same percentage as the black a student population. *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 275 (1986); *accord Britton v. South Bend Community Sch. Corp.*, 819 F.2d 766 (7th Cir. 1987) (en banc). Also, role model theory apparently cannot justify awarding broadcasting licenses to minorities, even though an interest in broadcast diversity can. *See Metro Broadcasting, Inc. v. FCC*, 110 S. Ct.2997, 3028 n.5 (Stevens, J., concurring); id. at 3035 (O'Connor, J.,dissenting). The Seventh Circuit had indicated that role model theory might justify gender as a bona fide occupational qualification. It has also indicated that empirical evidence is not always required to support such a position. *See Torres v. Wisconsin Dept. of Health & Social Services*, 859 F.2d 1523, 1531-32 (7th Cir. 1988), *cert. denied*, 489 U.S. 1017, 1082 (1989). The present case, however, involves race discrimination and race cannot be a bona fide occupational qualification. *See* 42 U.S.C. § 2000e-2(e).

12. After hearing the same evidence heard by this court, the jury in this action concluded that plaintiff had been subjected to discrimination in employment actions by some but not all of the defendants because of his race. This case called for difficult credibility judgments with respect to conflicting positions and evidence, issues best suited for decision by a jury. The jury made different decisions as to the defendant, each of which is supported by credible evidence. The jury's verdicts are supported by credible evidence and are adopted by the court.

13. Based on the facts and law as previously discussed. the court concludes that defendants' motions for judgment as a matter of law and for a new trial should be denied.

V. PUNITIVE DAMAGES

On a motion for judgment notwithstanding the verdict, it must be determined whether the evidence presented, including all reasonable inferences that may be drawn from it, is sufficient to support the verdict when viewed in a light most favorable to the non-moving party. *Matlock v. Barnes,* 932 F.2d 658, 663 (7th Cir. 1991) (*citing Tice v. Lampert Yards, Inc.*, 761 F.2d 1210, 1213 (7th Cir. 1985). A mere scintilla of evidence will not support a verdict. *Collins v. Illinois*, 830 F.2d 692, 697-98 (7th Cir. 1987). Judgment notwithstanding the verdict is appropriate if there is insufficient evidence upon which a reasonable person could properly base a verdict. *Tice*, 761 F.2d at 1213. For the following reasons, that part of the jury's verdict which awarded punitive damages against defendants is set aside as unsupported by the evidence.

On punitive damages, the jury was instructed as follows:

> Regardless of actual damages, the law permits the jury under certain circumstances to award the injured person punitive and exemplary damages in order to punish the wrongdoer for some violation of

the constitutional rights or some extraordinary misconduct, and to serve as an example or warning to others not to engage in such conduct.

If the jury should find from a preponderance of the evidence in the case that the act or omission of the individual defendants which proximately caused actual injury or damage to plaintiff was maliciously or wantonly or oppressively done, then the jury may, if in the exercise of discretion they unanimously choose to do so, award such amount as the jury shall unanimously agree to be proper as punitive and exemplary damages.

An act or a failure to act is maliciously done if promoted or accompanied by ill will or spite or grudge either toward the injured person individually or toward all persons in one or more groups or categories of which the injured person is a member.

An act or a failure to act is wantonly done if done in reckless disregard or callous disregard to the rights of one or more persons including the injured person.

An act or a failure to act is oppressively done if done in a way or manner which injures or damages or otherwise violates the rights of another person with unnecessary harshness or severity as by misuse, or abuse of authority, or power, or by taking advantage of authority, or power, or by taking advantage of some [weakness] or disability or misfortune of another person.

Whether or not to make any award of punitive and exemplary damages is a matter exclusively within the province of the jury. But the amount of such extraordinary damages when awarded must be fixed with calm discretion and sound reason, and must never be either awarded or fixed in amount

> because of any sympathy or bias or prejudice with respect to any party to the case.

See McKinley v. Trattles, 732 F.2d 1320 (7th Cir. 1984) (punitive damages assessed for oppressive strip search); *Harris v. Harvey*, 605 F.2d 330 (7th Cir. 1979)(punitive damages awarded for racially motivated campaign to discredit black officer).

Plaintiff submitted no evidence that defendants actions were malicious or wanton, or that their actions were calculated to oppress plaintiff or were done in spite or ill will towards plaintiff. The evidence shows that defendants acted because of plaintiff's race. However, the evidence fails to show that defendants acted with ill will towards plaintiff. In fact, several of the defendants testified that they bore no ill will towards plaintiff on a personal level. It appears that defendants were apparently motivated by a desire to see a black role model as principal of a school where the majority of the students are black. This desire does not warrant the imposition of punitive damages. Thus, the jury verdict awarding punitive damages against defendants must be set aside as unsupported by the evidence.

In addition, prior to the Civil Rights Act of 1991, punitive damages were not available under Title VII. Thus, because defendant Rev. Fitz Barclay, Jr. is found liable only on the Title VII claim, any punitive damages assessed against him must be stricken. Thus, the jury's award of $1,000 punitive damages against defendant Rev. Fitz Barclay, Jr. must also be stricken because not available.

IT IS THEREFORE ORDERED that:

(1) The motion of plaintiff for reinstatement is denied as moot.

(2) Plaintiff is awarded $92,465.00, the

discounted present value of the pension differential suffered as a result of the employment action of certain of the defendants, in addition to lost wages found by the jury to by $62,085.03.

(3) Defendants' motions for judgment as a matter of law, for a new trial, and to set aside the jury verdicts are denied.

(4) The verdicts of the jury and the judgments against defendants Barclay in the mount of $1,000, Gool in the amount of $1,500, Pearce in the amount of $3,000 and Robinson in the amount of $1,500 representing punitive damages are hereby vacated.

(5) Plaintiff's petition for attorney fees and costs is hereby reserved and set for a hearing on status on September 15, 1992 at 9:30 a.m.

(6) The Clerk of the Court is directed to enter an amended judgment order as follows:

(a) The claims of plaintiff Walter E. Pilditch against defendants the Board of Education of the City of Chicago, Esther Morgan-Watts and Grady C. Jordan are dismissed on the merits against plaintiff and in favor of said defendants with prejudice

(b) Judgment is entered in favor of plaintiff and against defendants Barclay, Gool, Pearce and Robinson in the amount of $154,550.03 representing lost wages and lost pension benefits.

(c) Plaintiff is granted attorney fees and costs to be fixed by the court.

(d) The judgment order entered in this case dated May 4, 1992 is vacated and superseded by this judgment.

ENTER:

/s/ WILLIAM T. HART
UNITED STATES DISTRICT JUDGE

Dated; SEPTEMBER 2, 1992